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Supreme Court, U.S.
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No. 01-346

IN THE

Supreme Court of the United States

VACANCES HELIADES S.A. and
NIMELIAS ENTERPRISES S.A.,

Petitioners,

v.

AAR INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners claim that the question presented is whether dispositive or non-dispositive weight should be given to a contractual forum selection clause. This question is not raised by the facts of the case or by the decisions of the courts below. Consistent with such facts and decisions, the question presented is properly the following:

> In an aircraft lease freely negotiated between sophisticated international parties, should an unambiguous clause providing that the parties shall waive any objections to venue in an Illinois state or federal court and any claim that such court is an inconvenient forum (the "Venue/ Inconvenient Forum Waiver Clause") be enforced in accordance with its terms, subject only to limited exceptions as to enforceability and validity that Petitioners have conceded are not present in this case?

STATEMENT PURSUANT TO RULE 29.6

Respondent, AAR International, Inc., states that its parent corporation is AAR Corp., and that no publicly held company other than AAR Corp. owns 10% or more of Respondent's stock.

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Respondent, AAR International, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Seventh Circuit's opinion in this case.

OPINIONS BELOW

The Petition erroneously states that the opinion of the court of appeals is reported at *AAR Int'l Inc. v. Nimelias Enters. S.A.*, 250 F.3d 527 (7th Cir. 2001). [Pet. at p. 1]. The correct citation is 250 F.3d 510.

STATEMENT OF THE CASE

Petitioners freely entered into an Aircraft Lease Agreement dated May 14, 1998 (the "Lease") with Respondent, whose substantive and procedural terms Petitioners now seek to avoid.[1]

The substantive provisions that Petitioners do not wish enforced are in Sections 4 and 1E of the Lease. Section 4 provided that Respondents leased a Boeing 737-3Q8 aircraft (the "Aircraft") to Petitioners on an "as is" basis and made no warranties whatsoever about its condition. [Respondent's Appeal Br., App. 4 at p. 12]. The undisputed facts in the record show that this is fully consistent with the custom and

1. Petitioners, Vacances Heliades S.A., Nimelias Enterprises S.A., and another defendant in the courts below, Princess Airlines S.A., were the Lessee, Sublessee and Subsublessee of the Aircraft, respectively. Petitioners have assigned to Respondent their rights as Sublessor and Subsublessor under the Sublease and the Subsublease, respectively. Consequently, each of Petitioners and Princess Airlines S.A. are liable to Respondent. Because the Lease, the Sublease and the Subsublease are substantially identical, this Brief will refer only to the provisions of the Lease.

practice in the aircraft leasing industry, where the lessee assumes any risk regarding the condition of the leased aircraft, including its engines. Section 1E of the Lease further provided that Respondents' obligations under the Lease are "absolute and unconditional under any and all circumstances and regardless of other events" and are not subject to "any right of set-off, counterclaim, recoupment, defense or other right," or the unavailability or other interruption in the use of the Aircraft for any reason. [*Id.* at App. 4 p. 6].

The procedural provision that Petitioners seek to circumvent is in Section 20B of the Lease. Section 20B provided for non-exclusive jurisdiction in the Illinois federal and state courts, but also contained an unambiguous Venue/ Inconvenient Forum Waiver Clause that required that neither the Lessee nor the Lessor shall object to venue in an Illinois court, and that they waive any inconvenient forum claim. [Pet., App. B at 21]. In their response brief in the Seventh Circuit, Petitioners conceded that the enforceability of Section 20B of the Lease is "an issue not generally disputed" by it. [Petitioners' Appeal Br. at p. 31].

As of August 23, 1999, Petitioners were in default of multiple obligations under the Lease. The defaults included the following: (i) Petitioners had permitted delinquent EuroControl[2] charges to accrue with respect to the Aircraft; (ii) Petitioners had failed to comply with their obligations to keep the Aircraft in good operating condition; and (iii) Petitioners had failed to pay Variable Rent under the Lease for July, 1999. This led the Owner Trustee of the Aircraft and Respondent to provide Petitioners with written

2. EuroControl is the European Organization for the Safety of Air Navigation.

notice of default on August 23, 1999 and with written notice of termination of the Lease on September 7, 1999. [R.1 at p. 5]. Petitioners have never disputed the fact that they were in default of the Lease. [Respondent's Reply Br. at pp. 2-3].

Petitioners' defense to their default is that they have had to repair one of the engines on the Aircraft. [R.6]. In an Illinois court construing the Illinois law that controls the Lease, Respondents would have no hope of prevailing on this defense. Indeed, Section 2A-214 of the Uniform Commercial Code as adopted in Illinois, 810 ILCS 5/2A-214 (2001), expressly validates the exclusion of warranties such as provided for in Section 4 of the Lease.

In order to avoid litigation in Illinois, on October 1, 1999, or shortly *after* receiving the notices of default and termination, Petitioners commenced legal proceedings against Respondent for breach of warranty in Athens, Greece.[3] [R.8 Ex. C at pp. 1, 15]. In ordering a preliminary attachment of the Aircraft on January 25, 2000 to secure Petitioners' alleged claims, the Greek court ignored the provisions of the Lease that unambiguously provided that Respondent had made no warranties regarding the Aircraft.[4] [R.6, Ex. Q at pp. 2-3].

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3. Princess Airlines S.A., the Subsublessee of the Aircraft and a defendant in the courts below, is a Greek corporation with its principal place of business in Hellinkon, Greece.

4. In granting the attachment, the Greek court also ruled, without evidentiary support, that Respondent and its parent company are "one and the same legal person" and that Respondent's parent company's assets are "doubtful" and that the Aircraft is its "sole negotiable asset". [R.8 Ex. Q at pp. 3-4].

On December 13, 1999, Respondent filed suit on its claims in the United States District Court for the Northern District of Illinois. The District Court on June 13, 1999 granted Petitioners' motion for abstention under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), and did not reach Petitioners' *forum non conveniens* motion. *AAR Int'l, Inc. v. Vacances Heliades S.A.*, 100 F. Supp. 2d 875, 876 (N.D. Ill. 2000). In its April 27, 2001 ruling, the Seventh Circuit reversed the District Court's ruling on abstention. 250 F.3d at 517-23. The Seventh Circuit further held that Petitioners' *forum non conveniens* motion must be denied, that the Venue/Inconvenient Forum Waiver Clause must be enforced, and that the litigation that Respondent filed is to proceed in the Illinois District Court. *Id.* at 523-27.

Petitioners do not seek review of the Seventh Circuit's ruling denying their motion for abstention. Instead, they suggest that this Court should grant its writ of certiorari in order to determine whether, in the context of a *forum non conveniens* motion, an unambiguous Venue/Inconvenient Forum Waiver Clause in an international commercial lease is to be enforced in accordance with its terms.

REASONS FOR DENYING THE WRIT

1. There is no conflict between the First Circuit's holding in *Royal Bed* and the Seventh Circuit's holding in this case.

Petitioners claim that this Court should grant certiorari because there is a conflict between the First Circuit's holding in *Royal Bed & Spring Co., Inc. v. Famossul Indus. e Comercio de Moveis Ltda.*, 906 F.2d 45 (1st Cir. 1990),

and the Seventh Circuit's holding in this case. [Pet. at pp. 6-7]. However, these holdings are entirely reconcilable and consistently reasoned.

The forum selection clause in *Royal Bed* designated: "'The judicial district of Curitiba, State of Parana, Brazil, as competent to settle any disputes or interpretations derived from this letter. . . .'" 906 F.2d at 46. That forum selection clause, by its terms, was non-exclusive. In view of that clause's non-exclusivity, the First Circuit correctly held that it was only one of the factors that should be considered and balanced in deciding the defendant's *forum non conveniens* motion.

Section 20B of the Lease in this case provides for non-exclusive jurisdiction in Illinois, but also includes the following Venue/Inconvenient Forum Waiver Clause:

> Each of Lessee and Lessor hereby irrevocably waives, to the fullest extent permitted by Law, any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement or any other Operative Document brought in any court in or of the State of Illinois, and hereby further irrevocably waives any claim that any such suit, action or proceeding brought in any court in or of the State of Illinois has been brought in a inconvenient forum. [Pet., App. E at p. 2].

This express Venue/Inconvenient Forum Waiver Clause was the basis for the Seventh Circuit's holding denying Petitioners' *forum non conveniens* motion. 250 F.3d

at 525-27. Because the contract in *Royal Bed* did not include such an express waiver, the facts of that case are entirely distinguishable.

Indeed, the holding of the First Circuit in *Royal Bed* is consistent with the holding of the Seventh Circuit in this case. In *Royal Bed*, the First Circuit noted that forum selection clauses in international commercial contracts generally should be enforced. 906 F.2d at 53. Finding that there was neither overreaching nor other factors that would counsel against application of the forum selection clause, the First Circuit ordered its specific enforcement. *Id. A fortiori*, the First Circuit would have ordered the specific enforcement of the Venue/Inconvenient Forum Waiver Clause appearing in Section 20B of the Lease. Consequently, there is no conflict between the First Circuit's holding in *Royal Bed* and the Seventh Circuit's holding in this case.

2. There is no conflict between this Court's holdings in *The Bremen* and *Stewart*.

Petitioners claim that this Court's holdings in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), have given rise to two inconsistent lines of cases, which they ask be reconciled. [Pet. at pp. 2-3]. Petitioners fail to recognize the essential difference between the issues decided in these two cases and their respective progeny.

Stewart involved a motion to transfer venue to another federal district court pursuant to 28 U.S.C. § 1404(a). In that statute, Congress specifically directed the federal district courts to consider a broad range of factors in deciding whether a case should be transferred. This Court therefore

held that a forum selection clause should not be automatically enforced or dismissed, but should receive "rather the consideration for which Congress provided in § 1404(a)." 487 U.S. at 31. However, the application of 28 U.S.C. § 1404(a) is limited by its terms to transfers from one federal district court to another federal district court. Thus, the statute does not apply to *forum non conveniens* motions when the alternative forum is in a foreign nation, as it is in this case.

In contradistinction, *The Bremen* involved the enforcement of a forum selection clause in the context of a *forum non conveniens* motion where the alternative forum was in London. This Court held that: "in the light of present-day commercial realties and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." 407 U.S. at 15. This Court's holding in *The Bremen* reflects the fact that *forum non conveniens* motions are not governed by 28 U.S.C. § 1404(a), and that, in enacting that provision, Congress did not intend to interfere with the strict enforcement of forum selection clauses in the international context.

Accordingly, there is no conflict between *Stewart* and *The Bremen*. The holdings of these cases demonstrate this Court's recognition that a different standard should apply when transfer is requested under 28 U.S.C. § 1404(a) from one federal district court to another, as opposed to when a *forum non conveniens* motion is brought seeking dismissal in favor of an alternative forum in foreign nation.[5] The facts

5. Petitioners claim not to "understand why an identical forum selection clause should be treated differently in motions to transfer venue and in motions to dismiss on grounds of *forum non conveniens*." [Pet. at p. 6]. To buttress this argument, they cite a (Cont'd)

of this case place it squarely in line with the *The Bremen*, and render Petitioners' invocation of *Stewart* irrelevant.

3. None of the cases cited in the Petition deals with an express Venue/Inconvenient Forum Waiver Clause.

Petitioners cite a number of cases which, in interpreting a forum selection clause, hold that the clause was permissive and therefore not mandatory. [Pet. at pp. 7-10]. These cases are irrelevant because none of them involves an express Venue/Inconvenient Forum Waiver Clause such as that included in Section 20B of the Lease. Petitioners place their principal reliance on two cases, *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974 (2d Cir. 1993), and *Fil Leveraged U.S. Government Bond Fund Ltd. v. TCW Funds Mgmt., Inc.*, 1998 U.S. App. LEXIS 17586, at *5 (9th Cir. July 29, 1998).

Petitioners state that: "The Seventh Circuit acknowledged that the Second Circuit took the contrary view of a similar clause in *Blanco*. . . ." [Pet. at p. 8]. However the forum selection clause in *Blanco* did *not* include a Venue/ Inconvenient Forum Waiver Clause. Indeed, the Second Circuit expressly indicated that if the choice of forum clause at issue had been strengthened by additional waiver language, the permissive clause would have been converted into a mandatory clause similar to that enforced in *The Bremen*, 997 F.2d at 979.

(Cont'd)
commentator's description of this phenomenon as a "bizarre dichotomy." Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts after Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 70-71 (1992). Read in context, this "bizarre dichotomy" only occurs when "the selected forum is another federal court." *Id.* Obviously then, this dichotomy is inapplicable here.

Petitioners similarly claim that *Fil* is "in direct conflict with the case presented for review." [Pet. at p. 9]. However, *Fil* is likewise inappropriate as there is no Venue/ Inconvenient Forum Waiver Clause in the forum selection provision at issue. *Fil*, like the rest of Petitioners' cited cases, concerns the "difference between exclusive (mandatory) forum selection clauses and non-exclusive (permissive)," but it cannot possibly be understood as in "direct conflict" with the Seventh Circuit's decision in this case. 1998 U.S. App. LEXIS 17586, at *5.

In sum, there is no conflict among the courts of appeal. Petitioners have not cited a single analogous case that has failed to enforce a Venue/Inconvenient Forum Waiver Clause.

4. There is no basis to disregard the Venue/Inconvenient Forum Waiver Clause in Section 20B of the Lease.

Petitioners make the incredible argument that: "It is hard to understand why added language in a forum selection clause specifically stating that a party will not object to a chosen forum should have any effect at all, much less turn a decision one way or the other." [Pet. at p. 9]. The sole support that Petitioners offer for this argument is a citation to *The Bremen*, which, they contend, supports their position that a claim of inconvenience should not stand to invalidate a forum selection clause. [*Id.*]. However, *The Bremen* involved a situation where a party freely consented to a forum selection clause, but then challenged it as inconvenient. 407 U.S. at 16. *The Bremen* thus supports Respondent, because it is Petitioners who are attempting to avoid the effect of the Venue/Inconvenient Forum Waiver Clause to which they expressly consented.

In a case construing an arbitration clause, this Court stated that "respondents' reading of the two clauses violates another cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton,* 514 U.S. 52, 63 (1995). Petitioners ignore this principle in contending that no weight at all should be given to the Venue/Inconvenient Forum Waiver Clause in Section 20B of the Lease.

The courts of appeal uniformly have recognized the significance of a Venue/Inconvenient Forum Waiver Clause, and understand that it can be read consistently with a choice of forum provision. As discussed above, the Second Circuit in *Blanco* held that the absence of such language was outcome determinative in holding that a choice of forum clause was permissive. In *Waters v. Browning Ferris Indus., Inc.*, 252 F.3d 796, 798 (5th Cir. 2001), the Fifth Circuit likewise enforced a clause providing that the defendant had specifically "waive[d] any objection it may have to the laying of venue of any such suit, action or legal proceeding in any of such courts." This provision led "to the inescapable conclusion that the plaintiff negotiated with the defendant a clear right to establish 'irrevocably' the place where his suit could be filed and heard." *Id.* The Fifth Circuit further noted that it reached this decision by reading all of the relevant clauses together, consistent with the principles of contract interpretation and with the Seventh Circuit's approach in this case.

5. The Seventh Circuit's ruling in this case was correct.

This Court has made clear that this Court's discretionary review: "depends on numerous factors other than the perceived correctness of the judgment we are asked to

review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Although this factor therefore merits relatively little consideration, the Seventh Circuit's ruling in this case was clearly correct for reasons that include the following:

a. The ruling advances the goals of certainty and predictability in international transactions.

Petitioners correctly state that it is desirable to advance the goals of certainty and predictability as to venue in international litigation. [Pet. at pp. 11-12]. Indeed, they quote the following from *The Bremen*, 407 U.S. at 13-14: "The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element of international trade, commerce, and contracting." [*Id.* at p. 11]. In cases subsequent to *The Bremen*, this Court has reaffirmed the importance of enforcing forum selection clauses in international contracts. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) ("A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."); *Mitsubishi Motors Corp. v. Soler*, 473 U.S. 614, 629 (1985) ("*The Bremen* and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions.").

The result that Petitioners advocate in this case is curiously inconsistent with the goals of certainty and predictability in international transactions that they purport to espouse. Petitioners urge this Court to hold that the district courts should disregard the express language of a Venue/

Inconvenient Forum Waiver Clause and instead should balance a myriad of factors in deciding which forum is the most convenient. This proposed holding would result in enormous confusion and uncertainty as to where venue properly lies.

The goals of certainty and predictability are best advanced by holding that an express Venue/Inconvenient Forum Waiver Clause in an international commercial contract is to be enforced in accordance with its terms subject only to limited exceptions as to enforceability and validity. This is exactly what the Seventh Circuit has held in this case.

b. The ruling is consistent with this Court's holdings enforcing arbitration clauses.

This Court consistently has upheld and enforced contracts involving arbitration clauses in a variety of contexts. *See, e.g., Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91 (2000) (liberal federal policy enforcing arbitration agreements should be protected); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995) (the benefits accorded the United States in participation in international transactions weigh against construing a federal statute to "nullify foreign arbitration clauses.").

Most recently, in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 121 S. Ct. 1589, 1592 (2001), this Court held that the Potawatomi Tribe's agreement to an arbitration clause in a contract rendered the Tribe amenable to suit in a state court to enforce the arbitration award. This Court concluded that: "the Tribe

clearly consented to arbitration and the enforcement of arbitral awards in Oklahoma state court; the Tribe thereby waived its sovereign immunity from C & L's suit." *Id.* at 1597.

Vacances Heliades likewise knowingly and explicitly waived its right to object to the chosen venue and to raise inconvenient forum claims. The same principles that support the enforcement of a clause waiving objections to an arbitration clause likewise require the enforcement of the Venue/Inconvenient Forum Waiver Clause.

c. The ruling is consistent with this Court's holdings that contractual language will be enforced according to its express terms absent compelling grounds to the contrary, and that a contract should be read to give effect to all its provisions.

The holding of *The Bremen* put forum selection clauses on the same footing as all other contractual provisions: "we conclude that the forum selection clause should control absent a strong showing that it should be set aside." 407 U.S. at 15. *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("ordinary state-law principles that govern the formation of contracts" generally apply to arbitration provisions); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995) (arbitration provisions should be treated with the same weight as the other provisions of the contract).

Petitioners are asking this Court to grant certiorari to determine whether the Venue/Inconvenient Forum Waiver Clause in Section 20B of the Lease should be enforced in

accordance with its terms. Because this Court's holdings clearly require such enforcement, there is no reason for this Court to grant review.

d. The ruling is consistent with the trend in state legislation.

Several states, including Illinois[6] (the forum state in this case), New York[7], Florida[8], Delaware[9], Ohio[10] and North Carolina[11] have enacted legislation regarding the enforcement of contractual choice of forum clauses. These states have recognized that such clauses are indispensable in commercial transactions and have codified that recognition.

For example, the Illinois statute provides for the enforceability of an Illinois choice of forum clause in a commercial contract arising out of a transaction of not less than $500,000. 735 ILCS 5/22-105-10. The New York law has been interpreted by state appellate authority as a "statutory mandate that a clause designating New York as the forum "shall" be enforceable, in cases involving $1 million or more, regardless of any inconvenience to the parties." *National Union Fire Ins. Co. of Pittsburgh v. Worley*,

6. 735 ILL. COMP. STAT. 5/22-105-10 (1998).

7. NY CLS. GEN. OBLIG. § 5-1402 (2001).

8. FLA. STAT. Ch. 685.101, ch. 685.102 (2000).

9. DEL. CODE ANN. tit. 6, § 2708 (2001).

10. OHIO REV. CODE ANN. § 2307.39 (2001).

11. N.C. GEN. STAT. § 22B-3 (2000).

690 N.Y.S.2d 57, 59 (N.Y. App. Div. 1999). The New York federal courts likewise have enforced this statutory provision. *See International Med. Tech., Inc. v. Lintech, LLC*, 2000 U.S. Dist. LEXIS 19522, at *5 (S.D.N.Y. Sept. 25, 2000); *Composite Holdings, LLC v. Westinghouse Elec. Corp.*, 992 F. Supp. 367, 370 (S.D.N.Y. 1998) (noting that its courts have consistently held that "the public policy of New York strongly supports enforcement of forum selection clauses.").

The enactment of these state statutes demonstrates a general trend toward enforcement of choice of forum provisions and bolsters the Seventh Circuit's decision to enforce the Venue/Inconvenient Forum Waiver Clause in Section 20B of the Lease.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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